In the

SUPREME COURT OF THE UNITED STATES

October Term 1977

No. ~~77-~~6540

HAROLD RAMSEY,

Petitioner,

-against-

THE STATE OF NEW YORK,

Respondent.

PETITION FOR A WRIT OF CERTIORARI

RHODES & FISHER
Counsel to Petitioner
16 Court Street
Suite 1210
Brooklyn, New York 11241
(212) 624-3784

STEVEN W. FISHER
Of Counsel

In the

SUPREME COURT OF THE UNITED STATES

October Term 1977

No.

HAROLD RAMSEY,

Petitioner,

-against-

THE STATE OF NEW YORK,

Respondent.

PETITION FOR A WRIT OF CERTIORARI

Preliminary Statement

The petitioner seeks a writ of certiorari to the Appellate Division of the Supreme Court of New York to review the affirmance of a judgment of conviction entered against him on September 17, 1976, in the Supreme Court of Kings County. If accepted by the Court, this case would present the question of whether, consistent with due process, a trial judge may gratuitously inject himself into the plea bargaining process for the purpose of inducing a guilty plea, and, to that end, threaten that if the defendant is convicted after trial he will receive a sentence nearly four time greater than one once seriously discussed, and twice as great as the one then held out as part of a plea offer. By sustaining the validity of a guilty plea so obtained herein, the courts of New York have decided, incorrectly we think, an important constitutional question, which was specifically left open in Brady v. United States* and not reached in Bordenkircher v. Hayes,** and which has not been, but ought to be, settled by this Court.

*397U.S.742 (1970)
**___U.S.___, 98S.Ct.663 (1978)

Opinions Below

The Appellate Division of the Supreme Court of New York, Second Department, affirmed the judgment of conviction below without opinion. (See, Appendix A, infra.) On March 17, 1978, leave to appeal to the Court of Appeals of New York was denied by Hon. Charles D. Breitel, Chief Judge of that Court. (See, Appendix B, infra.)

Jurisdictional Statement

The order of the Appellate Division affirming the judgment was dated February 6, 1978. Jurisdiction to review it is conferred upon this Court by 28 U.S.C. Sec. 1257(3)

Question Presented

Whether a guilty plea is obtained in violation of due process of law when it is induced by a judge's threat that, should the defendant be convicted after trial, he will receive a sentence almost four times greater than one once seriously discussed, and more than twice as great as the one then held out as part of a plea offer.

Constitutional Provisions at Issue

The Fourteenth Amendment to the Constitution of the United States provides in relevant part:

> ...No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law;...

Statement of the Case

In 1975, the petitioner was named in two felony indictments, each accusing him of a robbery alleged to have been committed in Brooklyn, New York. When one of the cases reached a trial part in Supreme Court, Kings County, the judge there presiding learned that a plea agreement had previously been reached and then rejected by the petitioner in a conference held before a different judge. That agreement had called for the petitioner to plead guilty to one lesser robbery count in full satisfaction of all charges in both indictments, and had provided that he would receive a sentence no greater than a term of imprisonment of from three and a half to seven years.

The trial judge then suggested that, were the District Attorney again to agree to such a plea, the same disposition would probably be acceptable to the court. The petitioner, however, forestalled further discussion by insisting that he was innocent.

Proceedings upon the indictment then commenced with a Wade hearing.* Before the court announced its findings, however, the petitioner suddenly offered to plead guilty, now to a higher robbery charge to satisfy both indictments. The plea was entered upon the understanding that the petitioner would now receive an increased sentence of not less than six and not more than twelve years imprisonment.

The circumstances prompting the petitioner's abrupt change of heart were not to be fully disclosed on the record until he appeared for sentence. On that day, the court had before it his motion to withdraw the plea. The motion was supported by trial

*United States v. Wade, 388 U.S. 218 (1967); Criminal Procedure Law of New York (hereinafter, CPL) Section 710.20[5](Consolidated Laws of New York, Book 11A, McKinney's 1971).

counsel's affidavit in which he averred, inter alia, "[t]hat since the inception of [his] assignment to defend him, the [petitioner] has maintained his innocence of the charges against him under [both] Indictments." The court agreed to hear and decide the motion then and there, and the District Attorney took no part in the exchanges that followed.

The judge began by reading portions of the transcript of the petitioner's plea allocution in which, under the court's questioning, he had agreed that he had participated in the crimes charged. When permitted to speak in his own behalf, however, the petitioner repudiated those admissions and explained why he had made them. He said:

> The only reason I took that plea on that day is because you harassed my lawyer in front of the Jury, you understand? You intimidated him.*
>
> * * *
>
> That is why I took my plea.
>
> * * *
>
> I am telling you I am not guilty. The only reason I took my plea is because I was coerced. You also told my attorney if I have a trial, you will give me twelve to twenty-five years, and he told me that.**

Thereafter, to support and clarify the petitioner's assertions, trial counsel offered his own account of the circumstances

*The trial judge apparently had deviated from statutory procedure by ordering jury selection prior to the Wade hearing. (CPL, supra Sec. 710.40[3])

**When it became clear that the court would not permit withdrawal of the plea, the petitioner inexcusably resorted to profanity and invective directed at the trial judge. For this misconduct, the petitioner was summarily, and appropriately, punished for contempt of court and sentenced to thirty days to be served prior to the commencement of the sentence imposed on the conviction.

surrounding the petitioner's sudden decision to plead guilty:

> It was a Miss Walker, your Honor, and it was the only one that took the stand [at the Wade hearing], and after that witness, there was some talk about a plea of guilty, and at that time, the plea of guilty was talked about as I came up to the bench, and we discussed it, and your Honor said that you would give six to twelve with the District Attorney's approval.
>
> I came back and said to my client six to twelve, and he said no, and it went back and forth, and finally we arrived at a decision.
>
> * * *
>
> ...We arrived at a six to twelve year sentence, prior to that time the admonition or the statement was made to me that if this guy goes to trial and he is convicted, he is going to get twelve and a half to twenty-five.
>
> Your Honor told me to take that back to my client which at the time I did, Judge. I gave him that warning.
>
> (Emphasis supplied)

The judge did not deny having instructed counsel to deliver that message to his reluctant client. He said only that the imposition of the threatened twelve and a half to twenty-five year sentence would have been "[s]ubject of course to me [sic] reading the probation report."

Ultimately the court denied the motion to withdraw the plea and imposed the promised six to twelve year sentence. Having read into the record the petitioner's unfavorable probation report the court remarked:

> ...The [petitioner] shows no remorse whatsoever. I almost wish I had not promised six to twelve, but nonetheless, I feel that six to twelve is enough time for this man to receive.
>
> (Emphasis supplied.)

As heretofore noted, the judgment of conviction has been affirmed in the Appellate Division, and leave to appeal to New York's highest court has been denied. The petitioner, presently incarcerated pursuant to the judgment of conviction, now seeks certiorari solely to review the question of whether, by reason of the coercive conduct of the trial court, his guilty plea is

invalid as having been obtained in violation of due process of law.

ARGUMENT

> WHEN A TRIAL JUDGE THREATENS A DEFENDANT WITH A HARSHER SENTENCE IF CONVICTED AFTER TRIAL IN ORDER TO INDUCE HIM TO PLEAD GUILTY, SERIOUS DUE PROCESS QUESTIONS ARISE.BECAUSE THOSE QUESTIONS, AS YET UNRESOLVED BY THIS COURT, ARE OF CENTRAL IMPORTANCE IN THE ADMINISTRATION OF CRIMINAL JUSTICE, AND BECAUSE THIS CASE SO SQUARELY PRESENTS THEM, CERTIORARI SHOULD BE GRANTED HEREIN.

In Brady v. United States, supra, 397 U.S. 742 (1970), this Court held that, in and of itself, a defendant's exposure to the death penalty upon conviction after trial did not render his guilty plea to a lesser charge involuntary. The Court took care to point out, however, that

> We here make no reference to the situation where the prosecutor or judge, or both, deliberately employ their charging and sentencing powers to induce a particular defendant to tender a plea of guilty. In Brady's case there is no claim that the prosecutor threatened prosecution on a charge not justified by the evidence or that the trial judge threatened Brady with a harsher sentence if convicted after trial in order to induce him to plead guilty.*
>
> (Id. at 751 n.8.) (Emphasis supplied.)

In contrast, in the case at bar, the trial judge did indeed threaten the petitioner with a harsher sentence if convicted after trial -- and he clearly did so solely for the purpose of inducing him to plead guilty. After having heard a witness testify at the Wade hearing, and after having read a very unflattering probation report regarding the petitioner, the trial judge nevertheless felt that "six to twelve [years] is enough time for this man to receive." The threatened twelve and a half to twenty-five year term, then, was shown to have been nothing more than a device employed

*This comment, taken in the context of the case, strongly suggests that the result reached might have been different had a reluctant Brady tendered his guilty plea only after having received from the court a direct and gratuitous warning that, if he insisted on going to trial and were convicted, he would be sentenced to death.

by the court to induce the unwilling petitioner to plead guilty, for it was fully twice the term the judge thought appropriate even in view of the petitioner's background and the crimes charged.

This Court has recently addressed an important aspect of the plea bargaining process. It has recognized that "[p]lea bargaining flows from 'the mutuality of advantage' to defendants and prosecutors, each with his own reasons for wanting to avoid trial," and it has "accepted as constitutionally legitimate... that the prosecutor's interest at the bargaining table is to persuade the defendant to forego his right to plead not guilty." Bordenkircher v. Hayes, supra, ___U.S.___, ___, 98 S.Ct. 663, 668 (1978). It is beyond dispute, however, that a vast difference exists between the role of a prosecutor acting as one party to a bargaining process, and that of a trial judge vested with the authority and responsibility of presiding over the procedures through which criminal charges are to be resolved. See, e.g., Parker v. United States, 397 U.S. 790, 804 (opinion of Brennan J., in which Douglas, J. and Marshall, J. joined); United States v. LaVallee, 319 F. 2d 308, 319 (2nd Cir 1963)(Marshall, then Circuit Judge, dissenting.)

In many quarters, any kind of judicial participation in plea bargaining is frowned upon, but even the strongest criticisms do not comtemplate the sort of blatantly coercive pre-trial judicial interference evidenced in the record below. See, Note, Plea Bargaining and the Transformation of the Criminal Process, 90 HARV. L. REV. 564, 583-585 (1977); cf. Euziere v. United States 249 F. 2d 293 (10th Cir. 1957); Scott v. United States, 419 F2d. 264 (D.C. Cir 1969); United States v. Tateo, 214 F. Supp. 560(SDNY 1963).

In any event, however, this Court has not yet delineated the constitutional limits of judicial participation in plea bargaining, and, as demonstrated by the conduct of the trial judge below and by the affirmance in the appellate courts of New York, such guidance would appear to be both necessary and overdue. A state trial judge simply may not be permitted to abandon his neutral station in order actively to induce the surrender of a defendant's constitutional right to trial by jury. Were it otherwise, our system of criminal justice would be unable to accord an accused any semblance of due process of law. In Bordenkircher, supra, this Court examined the perimeter of the constitutionally permissible conduct of a prosecutor during plea bargaining. The petitioner now requests that a similar inquiry be undertaken into judicial participation in the same process. He therefore asks that certiorari be granted in order to afford the Court an opportunity to condemn the manner in which the guilty plea herein was obtained, and to establish constitutional standards by which a properly impartial role for our nation's judiciary may be restored.

CONCLUSION

FOR ALL OF THE FOREGOING REASONS, A PETITION FOR CERTIORARI SHOULD BE GRANTED HEREIN.

Dated: Brooklyn, New York
April 5, 1978

Respectfully submitted,
RHODES & FISHER
Counsel to the Petitioner
16 Court Street
Suite 1210
Brooklyn, New York 11241
(212) 624-3784

STEVEN W. FISHER
Of Counsel

APPENDIX A

At a Term of the Appellate Division of the Supreme Court
of the State of New York, Second Judicial Department,
held in Kings County on February 6, 1978

HON. JAMES D. HOPKINS, Justice Presiding
HON. VITO J. TITONE,
HON. JOSEPH A. SUOZZI,
HON. CHARLES MARGETT, } *Associate Justices*

The People of the State of New York,

Respondent,

v.

Harold Ramsey,

Appellant

Order on Appeal from Judgment of Conviction

In the above entitled action, the above named Harold Ramsey,

defendant in this action, having appealed to this court from a judgment of the Supreme Court, Kings County, rendered September 17, 1976;

and the said appeal having been submitted by Steven W. Fisher, Esq., of counsel for the appellant, and submitted by Laurie Stein Hershey, Esq., of counsel for the respondent, and due deliberation having been had thereon; and upon this court's decision slip heretofore filed and made a part hereof, it is:

ORDERED that the judgment appealed from is hereby unanimously affirmed.

Enter:

Clerk of the Appellate Division

B/mc

____AD2d_____ A - January 19, 1978

127 E The People, etc., respondent,
v. Harold Ramsey, appellant.

Rhodes, Baker & Fisher, Brooklyn, N.Y. (Steven W. Fisher of counsel), for appellant.

Eugene Gold, District Attorney, Brooklyn, N.Y. (Laurie Stein Hershey of counsel), for respondent.

Judgment of the Supreme Court, Kings County, rendered September 17, 1976, affirmed. No opinion.

HOPKINS, J.P., TITONE, SUOZZI and MARGETT, JJ., concur.

February 6, 1978. PEOPLE v RAMSEY, HAROLD 127 E

APPENDIX B

State of New York
Court of Appeals

BEFORE: HON. CHARLES D. BREITEL, Chief Judge

THE PEOPLE OF THE STATE OF NEW YORK
Respondent,

against

HAROLD RAMSEY,
Defendant-Appellant.

CERTIFICATE
DENYING
LEAVE

I, CHARLES D. BREITEL, Chief Judge of the Court of Appeals of the State of New York, do hereby certify that, upon application timely made by the above-named appellant for a certificate pursuant to CPL 460.20 and upon the record and proceedings herein,* there is no question of law presented which ought to be reviewed by the Court of Appeals and permission to appeal is hereby denied.

Dated at New York, New York
March 17, 19 78

Chief Judge

Steven W. Fisher, Esq.
16 Court Street
Brooklyn, New York 11241

Hon. Eugene Gold
District Attorney, Kings County
Municipal Bldg.
Brooklyn, New York 11201

Clerk, Court of Appeals

*Description of Order: 2-6-78 App Div 2 affmd. 9-17-76 Sup. Ct., Kings Co.